involve delivery at the time they were made. It is only when the purchaser seeks to take delivery of specific rubber by way of the completion of a contract to purchase that he is bound to have a licence to take delivery and a licensed store into which the goods may be delivered. These decisions have stood for over thirty years and although the *Stanton Nelson* case to which I have referred went to the Court of Appeal ([1958] M.L.J. 97) it was decided on an entirely different ground.

The present contract was a forward F.O.B. contract executory in its terms which did not involve delivery at the time it was made and accordingly, in my view, the contract was not illegal because of the defendants' failure to have a licence under section 3 of the Ordinance.

The Privy Council case of *Chai Sau Yin* v. *Liew Kwee Sam* [3] relied on by the defendants was an action for the price of rubber sold and delivered. It was a present purchase of the commodity followed by delivery and is, I think, clearly distinguishable from the present case.

Now the legislature must be taken to have been aware that for the past thirty years or more the Courts have held that section 3 of the Ordinance did not apply to forward contracts for the purchase of rubber. I think I am entitled to draw the inference that the legislature well knew of the interpretation placed on section 3 of the Ordinance by the Courts and although it had the Ordinance before it on some six or seven occasions since 1929 it failed to make any other provision.

This year, however, as the result, according to Mr. Lloyd, of it being hinted by the Court of Appeal in *Stanton Nelson & Co. Ltd.* v. *Mizrahie* to which I have already made reference that the Court might come to another view the legislature stepped in and put the matter beyond any possibility of doubt by the Rubber Dealers (Amendment) Ordinance, 1962 (No. 18 of 1962). This Ordinance provides that "purchase" means purchase of specific rubber pursuant to any contract or agreement providing for completion by delivery of such rubber but does not include purchase of unascertained rubber by description by means of a forward contract.

The judgment of the Court of Appeal in the *Stanton Nelson* case was delivered by Whyatt C.J. and while, as I have said, it was decided on another point in so far as it relates to the question we are now considering is confined to one short paragraph at p. 102 of the report cited above. I feel bound to say with the greatest respect that it is, in my opinion, singularly unhelpful and adds nothing to the subject.

In *Webb* v. *Outrim* [4] the Earl of Halsbury quoted with approval the words of Griffith C.J. in *D'Emden* v. *Pedder* [5] that "When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which has been so put upon them."

Moreover, the Ordinance read as a whole is clearly concerned with physical rubber as defined in section 2, delivered to a person. The rules made under section 18 of the Ordinance, namely, the Rubber Dealers (Forms) Rules, 1940 are all directed to the physical possession of rubber.

In *Ng Kean Tek* v. *Kam Hock Lye* [6] Jobling J. said "the case" — referring to *Syn Thong & Co.* v. *Tong Joo, supra* — "laid down that a licence under the Rubber Dealers Ordinance for the purchase of rubber is necessary when the purchaser takes delivery but not before. It is clear then that the contract (which was for the delivery of rubber) was not illegal when entered into.....".

For these reasons, therefore, I am of the opinion that the contract in the present case is not illegal and is enforceable and there must accordingly be judgment for the plaintiffs for the amount claimed, namely, $12,460 and costs.

Judgment for the plaintiff.

Solicitors: *Drew & Napier; L. A. J. Smith.*

TAN AH KIAN v. HAJI HASNAN

[O. C. J. (Gill J.) September 27, 1962]

[K.L. — Civil Suit No. 268 of 1960]

Contract — Sub-contract to lay roads — Work to be completed within stipulated date — Work not so completed — Termination of sub-contract without notice — Whether termination proper — Whether time of the essence — Contracts (Malay States) Ordinance, 1950, s.56 — Damages for breach of warranty — Claim in quantum meruit.

The defendant entered into agreement with the District Officer, Kuala Selangor, for the making of certain roads. He sub-contracted with the plaintiff for the completion of this work. A clause in the sub-contract provided for the whole work to be completed within the 30th day of May, 1960.

On May 30, 1960, the plaintiff had not completed the work. The defendant sent him a letter terminating the sub-contract without notice and arranged for the uncompleted work to be finished by someone else. The plaintiff asked for an extension of time to complete the work but no extension was granted.

The plaintiff brought an action for damages for breach of contract, alternatively for payment of a sum on the basis of *quantum meruit*.

Held: (1) there was no express stipulation making time of the essence of the contract and neither from the nature of the contract nor its subject matter nor from the intention of the parties could it be said that time had been made of the essence;

(2) the defendant was in consequence not entitled to terminate the sub-contract without giving the plaintiff notice to complete within a reasonable period and his action amounted to a breach of contract;

(3) the proper remedy of the plaintiff was in *quantum meruit* and not in damages and there should be judgment for the plaintiff for the amount he actually spent in the performance of the sub-contract.

Observations on principles as to time being the essence of the contract.

Observations on *quantum meruit*.

Cases referred to:—

(1) *Steedman* v. *Drinkle* [1916] 1 A.C. 275.
(2) *Stickney* v. *Keeble* [1915] A.C. 386.
(3) *Yeow Kim Pong Realty Ltd.* v. *Ng Kim Pong* [1962] M.L.J. 118.
(4) *Smith* v. *Lucas* (1881), 18 Ch. D. 531, 542.
(5) *Building & Estates Ltd.* v. *A.M. Connor* [1958] M.L.J. 173.
(6) *Cort* v. *The Ambergate Railway Co.* (1851), 17 Q.B. 127.
(7) *Planche* v. *Colburn* (1831), 8 Bing. 14.
(8) *H. Dakin & Co. Ltd.* v. *Lee* [1916] 1 K.B. 566.

ACTION.

Robert K. C. Hoh for the plaintiff.

S. Sothi for the defendant.

Cur. Adv. Vult.

Gill J.: The parties to this action on 6th May, 1960, entered into an agreement whereby the plaintiff agreed to supply, transport, spread and level, etc., good quality laterite from Batang Berjuntai Quarry for the making of certain stretches of roads in the Tanjong Karang area and at Pasir Panjang in the District of Kuala Selangor. The defendant in turn had obtained a contract for this work from the District Officer, Kuala Selangor, so that he was sub-letting his contract to the plaintiff. A clause in the agreement provided for the whole work to be completed within the 30th day of May, 1960.

The plaintiff commenced work on 6th May, 1960. On 30th May, 1960, the defendant sent him a letter (P.2) cancelling the agreement and on the same day he entered into an agreement with one Kathigesu to complete that part of the work which was left unfinished by the plaintiff. The plaintiff on receipt of P.2 sent a letter to the defendant dated the 4th of June, 1960, asking for a further ten days in which to complete the work and adding that if this was not agreed to, legal proceedings would be commenced against the defendant without further notice. There was no extension of time granted in response to this letter. The plaintiff now sues for damages for breach of contract or, in the alternative, for a sum of $4,079.98 on the basis of *quantum meruit*.

It will be convenient to set out the following recitals and clauses of the agreement as being relevant to the matters in dispute between the parties:—

"THIS AGREEMENT WITNESSETH:—

(3) WHEREAS the Contractor is the lawful person and undertaker who has so undertaken to carry out the under-mentioned road work for the District Officer, Kuala Selangor, by respective works indents and particulars shown below.

Supplying, transporting, spreading and levelling, etc. of good quality laterite from Batang Berjuntai Quarry on roads; such work to be in accordance to the specified requirements of the Government on roads:— (as under)

(a) At Sungei Leman, Tanjong Karang, 10 chains long by 8 feet wide by 4 inches thick . . . Vide Indent 18/60.

(b) At Sungei Tinggi Kiri, Tanjong Karang, 40 chains long by 8 feet wide by 4 inches thick . . . Vide Indent 18/60.

(c) Batu 23, Pasir Panjang, 30 chains long by 8 feet wide by 4 inches thick . . . Vide Indent 19/60.

(3) AND WHEREAS the Contractor is agreeing to sub-let his contract work on above-mentioned road work to the Sub-Contractor, AND WHEREAS the Sub-Contractor doth hereby agrees and undertakes to carry out the above works for the Contractor, the conditions and terms attached to and relating to the said work, to be so accomplished by the Sub-Contractor will be as follows:—

(4) **The Sub-Contractor:—**

a. X X X

b. WILL commence work on or about Sixth (6th) day of May, 1960, and start first on item (a) above — Sungei Leman road; (b) then afterwards or at the same time commence work on Sungei Tinggi Kiri road work; (c) and for the third he will do the Batu 23, Pasir Panjang road work.

c. WILL complete the whole work comprised by the said items and the corresponding works Indents within the **30th day of May, 1960.**

d. X X X

e. WILL receive payment from the Contractor on date of completion of each work; subject to the quality of work so carried out is in accordance with the requirements specified in the Indents, and accepted without dispute by the Government.

(5) THE SUB-CONTRACTOR will be provided with service of an Excavator at the Batang Berjuntai Quarry, to do the cutting and loading into Sub-Contractor's lorries, of all the required laterite, without delay caused in time, or other unjustified reasons. AND the cost of this item will be borne by the CONTRACTOR.

ANY neglect or delay caused under this heading by the CONTRACTOR will not render the SUB-CONTRACTOR for any liability, and that he will not be made to suffer for the neglect of the CONTRACTOR.

(6) **Special Conditions Applicable to Both Parties Hereto**

1. PAYMENT TO SUB-CONTRACTOR subject to his carrying out all works as mentioned and narrated in this Agreement.

A. BREACH of contract agreed upon herein by the CONTRACTOR, will render the SUB-CONTRACTOR eligible and entitled to report this matter to the Government Authorities, if necessary, and claim payment for his work direct from the Government.

TO THIS agreement, the CONTRACTOR hereby gives his full consent and promise, which he shall not revoke under any reason.

B. **Rate of Payment to the Sub-Contractor:—**

Sungei Leman, Tanjong Karang . . . 10 chains roadwork @ $68 (Dollars Sixty-eight only) per chain length, Sungei Kiri, Tanjong Karang . . . 40 chains roadwork @ $55 (Dollars fifty-five only) per chain length, Batu 23, Pasir Panjang, 30 chains length @ $80 (Dollars Eighty only) per chain."

The questions which the Court has to decide in this case are:—

(1) Whether the defendant upon the terms of the contract was entitled to terminate the contract;
(2) Assuming that the defendant could terminate the contract, whether such termination could be effective without reasonable notice to plaintiff;
(3) Whether the plaintiff or defendant committed such a breach of contract as would entitle the other party to be discharged from liability;
(4) Whether there was an implied term to extend the time within which to perform the contract; and
(5) Whether the plaintiff is entitled under the doctrine of *quantum meruit*.

To my mind all these questions turn on the general question as to whether time was of the essence of the contract.

The general principles as to time being the essence of the contract are these. Firstly, time is of the essence of the contract where the parties expressly stipulate in the contract that it shall be so. The quintessence of the decisions of the Indian Courts as regards the interpretation of section 55 of the Indian Contract Act, which corresponds to section 56 of the Contracts (Malay States) Ordinance, 1950, is stated by *Pollock and Mulla on Indian Contract* (8th edition) at page 338 as follows:

"An intention to make time of the essence of the contract must be expressed in unmistakable language: it may be inferred from what passed between the parties before, but not after, the contract is made."

The leading English authority on this point is the case of *Steedman* v. *Drinkle* [1] in which there was an agreement for sale of land. A part of the purchase price was paid on signing the agreement and the balance was payable by six annual instalments on December 1 of each year. The agreement provided that if the purchaser should make default in any of the payments, the vendor should be at liberty to cancel the agreement and to retain, as liquidated damages, the payments already made and that time was to be considered as of the essence of the agreement. Default having been made in the payment of the first instalment, the vendor cancelled the agreement. Upon the purchaser's assignees suing for specific performance it was held that, the parties having made time as of the essence of the contract, specific performance could not be ordered but that the forfeiture of the money paid was a penalty from which a relief should be granted on the proper terms. Viscount Haldane, in the course of his judgment, stated at page 279 as follows:—

"Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach."

Secondly time is of the essence of the contract where it was not originally stated to be so but has been made so by one party by giving reasonable notice to the other, who has failed to perform the contract, with sufficient promptitude: *Stickney* v. *Keeble* [2]. This was also a case which arose out of a contract of sale of land on payment of a deposit on the purchase money. The date fixed for completion was October 11. The vendors delayed completion of the purchaser's contract in order to complete their title. On January 30th next the purchaser, who had repeatedly pressed for completion, gave notice to the vendors, requiring them to complete in a fortnight and, on their failure to complete within the time brought an action for the return of his deposit. At the date of the notice the purchaser's conveyance awaited the approval of certain mortgagees on the estate and required execution by eight parties residing in various parts of England. It was held that there had been unnecessary delay in completion for which the vendors were responsible, and that in the circumstances the time limited by the notice was sufficient.

Thirdly, time is the essence of the contract where from the nature of the contract or of its subject matter time must be taken to be of the essence of the agreement. A simple illustration of this rule would be the case of a sale of property which fluctuates in value with the passage of time.

In the case of *Yeow Kim Pong Realty Ltd.* v. *Ng Kim Pong* [3], the Privy Council said at page 120:—

"The question whether time is the essence of a contract is one to be determined by ascertaining the real intention of the parties. This is to be gathered by the examination amongst other things of attendant circumstances."

As regards intention of the parties, the cardinal presumption is that the parties are presumed to have intended what they have in fact said, so that their words must be construed as they stand. The duty of the court is to consider the meaning of the words used and not to guess the intention of the parties. Jessel M.R. in the case of *Smith* v. *Lucas* [4] said:—

".....but, of course, as I very often say, one must consider the meanings of the words used, not what one may guess to be the intention of the parties."

The meaning of the document or of a particular part of it must be sought in the document itself and within its four corners.

Applying the above principles of law to the agreement in this case, I have no hesitation in saying that time was not of the essence of the contract. It cannot be argued by any stretch of imagination that there is anything in the agreement which can be construed to mean that time was expressly stated to be of the essence of the contract. The defendant stated in evidence as follows:

"When I entered into contract with plaintiff on 6th May, 1960, the work was to be completed in one month. I asked him whether he could complete the work in one month. He said he would finish it earlier. According to agreement work was to start on 1st May, 1960, and the work was to be completed by 30th May. I do not remember date of agreement, but the agreement was that the work should be completed by 30th May, 1960. That is the date on which according to indents (D. 15) the work should be completed."

It was open to the defendant on 27th May, 1960, when he inspected the work with the Assistant District Officer, Tanjong Karang, to serve a notice on the plaintiff to complete by a certain date and thus make time of the essence of the contract. He did not elect to do so and must therefore bear the consequences of his

folly. He waited until 30th May, 1960, the date mentioned in the contract for the completion of the work, to serve a notice on the plaintiff terminating the agreement and on that very date proceeded to enter into an agreement with another party to complete the work. It would be convenient to state at this stage that he gave the plaintiff no reasonable notice at all to complete the agreement.

The nature of the contract or of its subject matter was such that it would be wrong to draw an inference that time was of the essence, nor is there any evidence of any attendant or surrounding circumstances from which it can be gathered that it was so. If there were any evidence that it was within the contemplation of the parties that the roads were required for a specific purpose and it was imperative that they should be ready by 30th May, 1960, it would be logical to draw an inference in favour of the defendant. For instance, if before the contract the parties knew or had reason to believe that the roads were being built to enable the Minister of Agriculture to proceed along these roads in his motor car to visit certain kampongs, to which the proposed roads were intended to be approach roads, on 31st May or 1st June, the Court would hold that the date specified for completion would go to the root of the contract.

The evidence in this case is relatively simple. Very briefly, the plaintiff's evidence is that he commenced work on 6th May, 1960. He had not completed the work by 30th May, 1960, as there was six to seven chains of road still left to be done at Sungei Tinggi Kiri. He stated, contrary to what the defendant said in his evidence, that he did not inform the defendant at any time that he had completed the work. He did not at any time inspect the work with the defendant and he denied most emphatically that he told the defendant on 26th May, 1960 that he had completed his work. No complaint was made to him about the quality of his work until he received P.2, when he first came to know that there was a complaint about his work not being up to standard. He said that he could not complete the work before 30th May, 1960, because of rain on two or three days during the period and because the excavator went out of order. He said that he spent a total sum of $4.079.98 for the work which he had done until his contract was terminated. His entire evidence was not seriously challenged, and I have no hesitation in saying that he struck me as a straight and truthful witness. I accept his evidence that he did not inform the defendant at any time that he had completed the work. I cannot believe that when admittedly some parts of the road were still left to be completed he would be so naive as to inform the defendant that he had completed the work. Having believed him, I must totally reject the evidence of the defendant on the point.

The plaintiff called as witness an engineer (PW.1) to testify that in road building contracts in this country it is customary to allow an extension of time. The engineer stated in evidence that he was speaking from experience of similar but larger contracts in this country where he was a consulting engineer. His evidence again was not seriously challenged, but in view of what I have stated before it is not necessary to deal with this point at length. To my mind this point is not necessary for a decision in this case and I do not propose to rest my decision entirely on it.

The defendant's evidence is that he inspected the work with the Assistant District Officer, Tanjong Karang, on 27th May, 1960, and found that the work had not been properly done. He therefore sent a letter to the plaintiff on 30th May, 1960, terminating the contract. From his demeanour in the witness box and by reason of what I have said about plaintiff's evidence, I am compelled to say that I do not accept his evidence, firstly, that the plaintiff informed him about having completed the work and, secondly, that he informed the plaintiff about his proposed inspection of the work with the Assistant District Officer on the 27th of May, 1960. His evidence as to the amount he spent for getting the work completed is not challenged, but this is relevant only in so far as it goes to show that it would have cost the plaintiff much more than $550 to complete the work left undone.

The defendant also called the Assistant District Officer, Ismail bin Abdul Rahman, as a witness (DW.2), whose evidence as regards extension of time was most significant. He said:

> " Some parts of the road complied with the indent. In such a case I would recommend that the contractor re-do the deficiencies. I would make the recommendation because I would consider that the major portion of the work was completed and only portions would require filling in to bring up to stipulation. My view was that the deficiencies could be corrected. Because of the deficiencies I would not recommend cancellation of the indent on that ground."

He went on to say that he knew that the time for completing this contract was extended. The contract was a small contract for a rural project and he recommended extension after inspection. This was supported by the evidence of the defendant to the effect that he received full payment on his contract with the Government.

In all the circumstances of this case I am of the opinion that upon the terms of the agreement the defendant was not entitled to terminate the agreement without giving the plaintiff a notice to complete performance within a reasonable period. It follows that there was an implied term of the contract to extend the time within which the work should be completed.

The provisions of our law on time being of the essence of the contract are set out in section 56 of the Contracts (Malay States) Ordinance, 1950, which reads as follows:

> " (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes

voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure."

These provisions of our law are akin to the distinction in English law between a condition the breach of which entitles the other party to treat himself as discharged from liability under the contract and a warranty which merely gives him a right to damages. The English law is summarised in paragraph 575 of *Chitty on Contracts* (22nd edition) as follows:—

"Once it has been established that a certain stipulation is indeed a term of the contract, the question arises as to its comparative importance and effect. Contracts are normally made up of a number of terms, some of which may be regarded as of major, and others of minor, importance. In English law, the breach of any term will normally give a right to the injured party to claim damages. But his further remedies will depend upon the importance of the term which has been broken. If the term may be regarded as essential to the undertaking, it is called a *condition*. The breach of a condition entitles the injured party either (i) to treat the contract as at an end, in which case the contract is said to be discharged by breach, or (ii) to continue to treat the contract as still binding and to content himself with damages, which are his remedy in any event. If, however, the term is merely subsidiary or collateral to the main undertaking, the breach of it will not entitle him to treat the contract as discharged, but to claim damages only. Such a subsidiary or collateral term is known as a *warranty* in law."

Having decided that time was not of the essence of the contract in this case I must hold that the stipulation in the contract as to performance by 30th May was a warranty and not a condition of the agreement. The breach of such warranty did not give the defendant the right to terminate the contract but to claim damages from the plaintiff, if he suffered any loss by reason of the completion of the contract outside the time fixed by the agreement. The answer to the question as to whether the plaintiff or the defendant committed such a breach of contract as would entitle the other party to be discharged from liability must therefore necessarily be that it was the defendant who committed a breach by repudiating the contract and preventing the plaintiff from completing his performance.

It would be convenient at this stage to deal with the defendant's case. His case very briefly is that the plaintiff did not complete the work by the agreed date so that he had to get someone else to complete it and this cost him a sum of $4,750. He is therefore liable to pay the plaintiff only a sum of $530 being the difference between the contract price and the amount it cost him to get the work completed. Learned counsel for the defendant cited the case of *Building & Estates Limited* v. *A. M. Connor* [5] in support of this proposition. I agree that the decision in that case would be relevant if the plaintiff had completed his work and it was found to be not in accordance with the specifications. He would then be entitled to have deducted from the contract price the amount spent by him for completing the deficiencies, but as I have said before, it was the defendant who was in breach by repudiating the contract during performance. That case, therefore, to my mind, does not help the defendant.

Coming now to the plaintiff's claim, the law is quite clear that if the employer gives notice to the contractor not to do any more work, that amounts to a total breach and entitles the contractor to treat the contract as at an end, provided that the notice is final. It is also clear that the contractor is forthwith exonerated from any further performance of his promise and is at once entitled to bring an action: *Cort* v. *The Ambergate Railway Company* [6]. It is again clear that if the other party to the contract prevents the plaintiff from completing his performance, the plaintiff may either recover damages for breach of contract or alternatively sue upon a *quantum meruit* to recover a reasonable remuneration for his partial performance. The authority for this proposition of law is to be found in the old case of *Planche* v. *Colburn* [7].

As regards damages for breach, it is well settled law that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. It is also equally well settled law that in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. In this connection the plaintiff says that it would have cost him $550 to complete performance so that he would have made a profit of approximately $650 on the whole contract. However, we have the unchallenged evidence of the defendant that it cost him $4,750 to complete the work. We also have the evidence of the Assistant District Officer that when on 27th May, 1960, he inspected the work done by the plaintiff he found that the thickness of the roads was two inches in some parts and three inches in some parts. He ascertained the thickness by kicking up laterite although he quite frankly agreed that thickness can be assessed more accurately by looking at the road from the side than from the top. The plaintiff himself said that six to seven chains of road was still to be laid at Sungei Tinggi Kiri and he readily agreed that the thickness of the roads laid by him might well have been two inches in some parts. His exact words were:

"The thickness of the laterite varied from six to three inches. It is not true that the entire thickness was two inches, although in some parts it might have been two inches."

On all this evidence I am satisfied that in order to make good the deficiencies it would have cost the plaintiff at least the difference between the contract price and the amount he had actually spent, so that he would have made no profit at

all on his contract. This is not surprising because quite conceivably there must be cases where contractors do not make a profit on some particular contracts. In the circumstances it would not be appropriate to allow the plaintiff's claim under this head.

Coming next to the claim on *quantum meruit*, I must say that the plaintiff's claim falls to be decided on this basis. As I have said before, *quantum meruit* is a remedy which is alternative to damages. The case for which it provides is where the party injured by a breach of contract has, at the time when the breach occurs, done part, but not all, of that which he is bound to do under the contract and is seeking to be recompensed for the value of what he has done. The case of *Planche* v. *Colburn, supra,* provides a useful illustration of the remedy. Perhaps I should mention that the plaintiff would also appear to be entitled to recover on *quantum meruit* on the doctrine of substantial performance, although I do not propose to rest my decision as regards *quantum meruit* entirely on this doctrine. The authority commonly cited for this proposition is the case of *H. Dakin & Co. Ltd.* v. *Lee* [8] in which it was decided that where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work which he has contracted to do; or (3) he has abandoned the work and left it unfinished.

The plaintiff's evidence as to the amount he spent on performance of the contract up to the date on which it was cancelled by the defendant has not been challenged in any way. There will therefore be judgment for the plaintiff against the defendant in the sum of $4,079.98 with interest thereon at 6% per annum from the date of the judgment to the date of satisfaction and costs to be taxed.

Judgment for the plaintiff.

Solicitors: *Eugene Lye & Hoh; S. Sothi.*

SAMSUDIN v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Good and Hill JJ.A.) September 29, 1962]

[K.L. — F.M. Criminal Appeal No. 29 of 1962]

Criminal Law and Procedure — Murder trial — Special jury — Granting application for — Whether necessary for judge to record his reasons — Criminal Procedure Code (Cap. 21), s.190.

Criminal Law and Procedure — Statements made to police by witnesses — Failure to direct that defence be supplied with copies of the statements — Criminal Procedure Code (Cap. 21), s.124(2) — Policy behind subsection.

It is not necessary for the trial judge to record his reasons for granting an application for a special jury and the fact that he gave defence counsel an opportunity of stating whether he had any objection or not shows that he did direct his mind to the question whether he should grant the application or not. The fact that he did grant it after being told that defence counsel had no objection implies that he must have considered it just and reasonable to do so.

The policy behind the provisions of section 124(2) of the Criminal Procedure Code (Cap. 21) is that where a witness gives evidence in court which the prosecution knows or the defence either knows or suspects to be in conflict with a statement which he has previously made to the police, it is in the interests of justice that the judge should be made aware of the discrepancy so that the credibility of the witnesses may be tested by cross-examination, under which he will either explain, or fail to explain, the discrepancy to the satisfaction of the court. As, however, it is unlikely that the whole of a witness's testimony would be in conflict with the whole of his previous statement the subsection is usually invoked for the purpose of focussing attention on particular discrepancies.

Observations on providing defence with copies of statements made to the police.

Observations on discretion of prosecution to call or not to call material witnesses.

Cases referred to:—

(1) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105, C.A. at p. 109.

(2) *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* [1944] A.C. 156, 168.

COURT OF APPEAL (CRIMINAL).

David Marshall for the appellant.

Harun M. Hashim (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Good J.A.: This appeal is against the appellant's conviction in the High Court at Penang for culpable homicide not amounting to murder contrary to section 304 of the Penal Code, and also against the sentence of seven years' imprisonment imposed upon him in respect of that conviction on the 5th July, 1962.

The incident as a result of which the appellant was charged occurred at about 10 p.m. on the 29th March, 1962 at the Swiss Hotel, Chulia Street, Penang, when a male Indian named Habib s/o Syed Ibrahim received a stab wound from which he died soon after being admitted to hospital. The appellant was charged with murder and tried by Hepworth J. and a special jury with the consequences already stated.

The incident occurred either inside a ground floor room of the hotel or outside the room in the courtyard. The only evidence of what took place was given by P.W.1 another male Indian who on the evening in question had been drinking with the deceased in a bar for some hours before going with the deceased to the hotel. The appellant made an unsworn statement from the dock and the jury had before them two different versions of what took place, one of which was given by P.W. 1 and the other by the appellant.

According to P.W. 1's story, on arriving at the hotel the deceased went upstairs to look for a girl named Inderani (D.W.3), who as it happened was not in the hotel at the time. P.W. 1